UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FRESH DEL MONTE PRODUCE INC.,

Plaintiff and
Counterclaim Defendant,

v. 08 CV 8718 (SHS)

DEL MONTE FOODS COMPANY and
DEL MONTE CORPORATION,

Defendants and
Counterclaim Plaintiffs.

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New York, N.Y.
August 31, 2015
2:43 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Attorneys for Plaintiff/Counterclaim Defendant
BY: ANTHONY J. DREYER
LAUREN E. AGUIAR
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BY: ABBY RUDZIN
SARA PETERSON

THE CLERK: Fresh Del Monte Produce versus Del Monte Foods, 08 Civ. 8718.

Counsel, please state your names for the record.

MR. DREYER: For the plaintiff Fresh Del Monte Produce Inc., Anthony Dreyer. With me is my partner Lauren Aguiar and my associate Jordan Feirman. Good afternoon, your Honor.

THE COURT: Good afternoon. Please be seated.

MS. RUDZIN: And Abby Rudzin here for the movant, which is Del Monte Foods Inc., which is a successor to the defendant in the case. And with me is my colleague Sara Peterson.

THE COURT: Good afternoon.

All right. This is a motion to clarify or to modify the injunction that I entered following the trial of this action in 2013. The motion has been around for a while, and I have some questions for each of you and then I am going to hear what you have to say. I want to see if we have agreement or lack of agreement on a couple of things.

I am going to refer to the plaintiff the same way I did during the trial, as Fresh, and the defendant will just be Del Monte or Del Monte Corporation, even though every time I deal with this case there are new entities but that is the general line.

Is everyone agreed that "pear chunks" contains blackberry juice and acai juice and acai is a berry?

Fresh, are we agreed on that?

MR. DREYER: We are, your Honor.

THE COURT: Del Monte?

MS. RUDZIN: I'm not sure whether acai is a berry, but I'm note sure that it matters because blackberry is obviously a berry.

THE COURT: We've got a berry.

MS. RUDZIN: OK. And I just want to say it is unclear whether it is juice or a concentrate.

THE COURT: Well, that is where I am going. Go ahead.

MS. RUDZIN: It is reconstituted juice, which I think means juice from concentrate.

THE COURT: Is it reconstituted -- well, the label which is attached to the papers here as 182-5, the label says, "Reconstituted juice blend (white grape juice, pear juice, blackberry juice)." So I think what you're telling me, Ms. Rudzin, is you agree it's reconstituted blackberry juice. OK.

And I take it Fresh, with that amendment, agrees as well?

MR. DREYER: I'm not sure, your Honor. If you recall, during the post-trial briefing, Del Monte took the position that it may have been a concentrate or a puree, and we invited somebody from the company to submit a declaration to that effect and no one did.

THE COURT: Well, let's talk about that for a moment and then I'll go back to what I wanted to do.

That seems to be sort of an unresolved issue here. You said, if I remember, oh, yes, we'll withdraw pear chunks from the injunction as long as you tell us that there's what? And they did not tell you that and, therefore, you never in haec verba withdrew it. So that's a loose end hanging up there.

MR. DREYER: Correct. If they were to represent that the acai and the blackberry -- and, again, we believe acai is a berry -- the acai and the blackberry ingredients were concentrates or purees. And the reason for that is --

THE COURT: Wait. Let me think of that.

MR. DREYER: Sure.

THE COURT: Well, the reason is obvious. It's because Paragraph 1 -- Paragraph A of Exhibit B was not at issue.

MR. DREYER: Correct.

THE COURT: And you agree, as well, Del Monte, that Paragraph A of Exhibit B to the License Agreement was not at issue?

MS. RUDZIN: We do.

THE COURT: OK.

MS. RUDZIN: I think where the disagreement is is we don't believe juices were an issue in the litigation at all, because we don't believe that Paragraph B -- neither the

Paragraph A or B gives FDP the right to use the marks on juices.

THE COURT: Mr. Dreyer, were you cut off by either myself or Ms. Rudzin?

MR. DREYER: I don't believe so, your Honor.

Just to make the record clear, the position was if the acai and the blackberry were from concentrates or purees, solely from concentrates or purees, we would withdraw the request that they be covered by the injunction.

THE COURT: Again, because everyone is agreeing that A to Exhibit B of the License Agreement was not at issue in the trial?

MR. DREYER: Correct, your Honor.

THE COURT: OK. So now let's talk for a moment about what Ms. Rudzin was saying.

Mr. Dreyer, what is Fresh's position if the blackberry juice and the acai juice -- strike that.

Is a juice a concentrate or a puree or totally something different? Does a juice fit within concentrate and puree?

MR. DREYER: I don't believe it does, your Honor.

THE COURT: And why?

MR. DREYER: Because a concentrate is something that's sold as a concentrate where the ingredient is a concentrated puree as a pulp. That's not what we understood to be at issue

in this product.

THE COURT: What is a concentrate?

MR. DREYER: My understanding is it is a juice or other type of liquid form that has at least some of the water taken out and then added back in later.

THE COURT: Well, how does that differ from a reconstituted juice?

MR. DREYER: I don't know what the reconstituted juice is in this case. I don't know how it is reconstituted. There was no evidence of that at trial, because this argument that this product wasn't covered was never raised until after we had --

THE COURT: The product was covered, pear chunks were covered.

MR. DREYER: Correct.

THE COURT: What you are saying is the argument they are making now wasn't covered, but you are agreed that pear chunks were covered?

MR. DREYER: Correct. This product was covered --

THE COURT: I take it your position is that it was covered only in terms of the Lanham Act issues?

MR. DREYER: It was covered both as a Lanham Act product and a breaching project.

Let me explain that, your Honor. Our damages expert, Scott Phillips, put in a damages report both on the contract

and Lanham Act piece of the case. For his exhibit of damages for the contract damages, he specifically enumerated every product we asserted that Del Monte sold that breached the contract. And this product, this acai product, was specifically listed under the products we asserted breached the contract.

THE COURT: But the jury never saw that, right?

MR. DREYER: What the jury saw was the roll up to the final damages revenue which included the revenue for that product. Both our expert included it and their expert included it.

THE COURT: And when you say the "roll up," what was it included within? Was it included within the nonutilized fruit issue or a line or no?

MR. DREYER: Correct.

THE COURT: And the jury saw that?

MR. DREYER: Correct. To break it down -- the short answer is yes, your Honor. To break it down a bit further, Ms. Stamm, who is Del Monte's expert, submitted a rebuttal report. In her rebuttal report, she went through all the products that we listed as containing nonutilized fruit. She identified two that she and Del Monte Corp. asserted did not contain nonutilized fruit. One was a superfruit product, if you remember that product line -- Sun Fresh product, excuse me, Sun Fresh product.

THE COURT: I remember the little refrigerator.

MR. DREYER: Exactly.

THE COURT: To keep these things cold for the interminable length of the trial.

MR. DREYER: And the other was an Orchard Select product. She did not -- she said those products don't contain nonutilized fruits so they should be taken off the list. We agreed. She left in her report --

THE COURT: I'm sorry. Say that again.

MR. DREYER: Sure. Again, Mr. Phillips -- and this was submitted in our papers, Exhibit 2.5 to his report and it is Exhibit 3 to Mr. Feirman's declarations.

THE COURT: Let me get it out.

MR. DREYER: Sure. I can hand up a copy as well, your Honor.

THE COURT: I have it all.

(Pause)

I say that so quickly and it looks like the Feirman exhibit I left downstairs and I just have the Rudzin exhibit.

MR. DREYER: I will be more than happy to hand it up, your Honor. May I approach?

THE COURT: Yes.

(Pause)

Yes. All right. This is what I remember. Go ahead.

MR. DREYER: So the heading --

THE COURT: Nonutilized product and then within it acai/blackberry.

MR. DREYER: Right.

THE COURT: And the jury got this?

MR. DREYER: No. This was the roll up into what the jury got. If you'll recall, this was produced in 2010. We had settlement discussions. We had summary judgment motions.

During the trial, Del Monte supplemented its revenue reporting and so there was a separate exhibit that ultimately went to the jury. I just want to explain how we got there, if I may, your Honor. So clearly two years before trial we took the position that these were all of the products that contained either pineapple or nonutilized fruit and therefore we are told by Del Monte breached the contract.

They then submitted a rebuttal report by Ms. Stamm. Ms. Stamm went through this list that's in what I just handed your Honor, and said two of the products on this list don't belong here, they don't contain nonutilized fruit. She mentioned one of the Sun Fresh products. She mentioned one of the Orchard Select products. She did not mention the acai product, and, in fact, included the acai product in her calculation of revenue for the nonutilized fruit products.

So that was the state of play going into trial. And I would note that although your Honor's Pretrial Order requires the parties to identify all defenses to all claims, if you look

at page 7 of the Joint Pretrial Order that your Honor signed, they did not identify this issue as a defense to our claim that the acai product breached the contract.

So now we are at trial. The issue is never argued. Ms. Stamm creates a new exhibit that updates her damages figures. She has a line item for nonutilized fruit, and the 2009 number for nonutilized fruit hits the number that she had in her damages report, $1 point I believe 3589, and that amount based on her damages report included the acai product.

And I can hand it up to your Honor. It is Exhibit 4 to Mr. Feirman's declaration. I'm sorry, that is Exhibit 4 to Ms. Rudzin's declaration.

THE COURT: That I have.

(Pause)

MR. DREYER: Forgive me, your Honor. Exhibit 3 to Ms. Rudzin's declaration, the supplemental declaration. It is the declaration filed 6/6/14, your Honor.

THE COURT: Yes. I am looking at it.

What are you showing me on it?

MR. DREYER: So if you look at --

THE COURT: Nonutilized fruit product not containing pineapple?

MR. DREYER: Right. So if you look at fiscal year 2009, the revenue is $1.358 million.

THE COURT: Yes.

MR. DREYER: That hits exactly to what Mr. Phillips had in his report. She didn't break it down product by product, but it's clear she included it because the revenue hits exactly.

THE COURT: And we don't know what the jury was utilizing in terms of damages.

MR. DREYER: No, I understand. So let me get to that, your Honor. I just wanted to explain how we got to the jury because it is a little complicated given the way that Del Monte produced their revenue here.

If you recall, in the middle of trial Del Monte updated its revenue figures, and what went to the jury was Trial Exhibit 544, which is Exhibit 3 to Ms. Rudzin's supplemental declaration. And if you look at fiscal year 2009, again there is the 1.358 amount.

THE COURT: Yep.

MR. DREYER: And then 2010 -- sorry, forgive me, your Honor.

(Pause)

In 2010 it is $1.41 million, and that's what in the supplemental reports.

THE COURT: No. It is 1.6.

MR. DREYER: Forgive me, your Honor. I apologize. I thought I had it.

It is Trial Exhibit 544, which is --

THE COURT: Exhibit 3.

MR. DREYER: Exhibit 3. Forgive me, your Honor, too many Exhibit 3s.

So under "Fiscal Year 2009," you have nonutilized fruit products not containing pineapple 1.358 million, which we know from her original report includes --

THE COURT: Right. I understand your point.

MR. DREYER: And then the roll-up, 2010, 2011, 2012. So we know at least for 2009, the revenue from the acai berry product is included in what went to the jury.

On top of that, your Honor, if you look at the total revenue of $338 million, both sides agree that the jury applied a 1.75 percent royalty to the damages that were awarded to Fresh. So if you multiply that royalty times $338.4 million, you get roughly to the damages award that the jury awarded in this case.

So I apologize for the circuitous path but that's how we got there.

THE COURT: So your argument is, reasoning backwards, the jury included the pear chunks product in their calculation; that's where you are going?

MR. DREYER: Correct. And there was also a demonstrative that Mr. Phillips used that went to the jury that used the same $338 million revenue figure which included the --

THE COURT: I'm sorry. Go ahead.

MR. DREYER: We had a similar demonstrative that had the same revenue of $338 million for the nonutilized fruit products and the pineapple product.

THE COURT: So this point put forth on behalf of Fresh is that the jury included pear chunks, Fresh believes, in their damage calculations reasoning backwards from the royalty rate that they found, that they applied.

MR. DREYER: Reasoning backwards from the royalty rate that both sides agree was applied here and looking at the documents that were submitted to the jury and knowing where those numbers came from, yes, your Honor.

THE COURT: But do you agree with Del Monte, or let's -- I'll ask it more neutrally. Do you agree with me that at trial itself pear chunks, the exhibit, was used for Lanham Act purposes?

MR. DREYER: I don't, your Honor. Well, I agree that it was used for Lanham Act purposes but not solely for Lanham Act purposes.

THE COURT: And the "not solely" goes to damages?

MR. DREYER: For the contract claim. In other words, we had a Lanham Act claim and we had a breach of contract claim.

THE COURT: OK.

MR. DREYER: We asserted that the pear chunks product violated the Lanham Act and also breached the contract. So it

was used for both purposes.

THE COURT: Now, I'll also ask this one neutrally or as neutrally as I can.

Exhibit B -- again, I mean the License Agreement, the core document here -- Paragraph B, "Exclusive Rights," that's what was at issue in the trial, not the nonexclusive rights -- we've already been over this -- not the nonexclusive rights under A, right?

MR. DREYER: Correct, your Honor.

THE COURT: OK. It deals with refrigerated pineapple products and refrigerated nonutilized fruit, and "nonutilized fruit" includes berries.

If B is berries for these purposes and A is concentrates and purees, where is juice?

MR. DREYER: Well, it wasn't an issue in this case. Quite frankly, it is an issue that is now before Judge Oetken in another case. So we don't argue that --

THE COURT: Between these parties?

MR. DREYER: Between these parties.

And Judge Oetken or a jury will decide that issue. We don't contend that the case before you is about beverages. We have never argued that. We are not contending that now. That is an issue that is before Judge Oetken. Neither side I think should take whatever decision you render on this motion to Judge Oetken and say, aha, here, the case has now been

resolved. That is a different issue.

Now, there are different ways in which you get the juice. One certainly would be a refrigerated pineapple product. We believe that includes juice. But that issue wasn't before you, your Honor.

What was before you clearly, as I just laid out, was cut-fruit products and who has the right to sell cut-fruit products if they're made from one of the five fruits. And there was never any argument at trial, never any argument leading up to trial, that Del Monte had this other defense, that you shouldn't have this product on your list. Even though our expert includes it as a nonutilized fruit, you shouldn't have it on your list because it's really in there as a juice or something else.

And so we are completely prejudiced. We could have raised that issue with the jury. We could have litigated that issue. We were all here. We had the cut fruit in the courtroom. Instead, they raise this as a defense after trial. Quite frankly, your Honor, we don't think it is appropriate.

THE COURT: All right. Thank you.

Ms. Rudzin, let me proceed from that point.

The Pretrial Order says nothing about juices or concentrates, does it?

MS. RUDZIN: No, it doesn't mention orange juice, concentrate or puree. So to Mr. Dreyer's point that you didn't

raise this as a defense, I say you didn't raise it as a claim. You didn't say that you have the right to make juice under Paragraph B so we didn't have to put up a defense to that claim. And as --

THE COURT: No. No. He's -- go ahead.

MS. RUDZIN: I was just going to say, as you were pointing out with Mr. Dreyer, there were two claims at issue in the lawsuit. There were lots and lots of products that were shown to the jury -- and witnesses testified about them -- that weren't claimed to be breaching the contract because they don't contain even a single molecule of the five fruits. So the fact that the pear chunks product was put before the jury and that witnesses testified about it doesn't tell us whether they were claiming it was a breach of contract. And they haven't pointed to a single sentence in the whole trial record where either a witness or a lawyer argued that the pear chunks product breaches the Wafer License.

THE COURT: Breaches the?

MS. RUDZIN: The Wafer License -- the license.

Now, it's true that the experts included it in their damages reports. As you pointed out, those didn't go to the jury. The jury wasn't told by either expert here's my sales figure and, by the way, it includes this pear chunks product. Neither expert uttered the words "pear" or "juice" at trial. So I don't think you can infer from the jury's verdict, which,

by the way, didn't adopt either experts' damage number, but even if it had used the sales figure, you can't infer from that that the jury was agreeing with the component parts when they didn't even know what the component parts were.

THE COURT: So if "juice" is not mentioned at the trial, pear chunks just for limited purposes, concentrates not mentioned, what am I doing opining on whether a juice, a berry juice, is in or out of this injunction? Why should I be opining one way or the other here?

MS. RUDZIN: I think you shouldn't, your Honor, and that's -- the basis of our motion today is --

THE COURT: No, but you're asking me to clarify or modify the injunction. You're asking me to make a statement as to it.

MS. RUDZIN: Right. I'm asking you to limit the injunction to cut pieces of the five fruits because that's all the jury decided was a breach. I'm asking you to leave for another day whether juices, concentrates or purees are theirs or ours because that wasn't at trial.

Think about what we're taking about here. We're talking about an injunction against my client, which manufactures food products, being told you can't make certain food products. All we're asking for is a clear statement of what that covers so that we can fully comply. And we --

THE COURT: Why should I -- I think Fresh is saying I

don't have any power to modify an injunction. Why should I be doing that as opposed to -- goodness gracious, I hope not -- having another litigation over "juice"?

MS. RUDZIN: Because we're not asking you to decide who has the rights to juice. We're asking you to clarify --

THE COURT: That was an issue before Judge Oetken?

MS. RUDZIN: That's one of the issues, yes. We're just asking you to clarify that you didn't decide it.

If I could -- your Honor, could I hand up a PowerPoint that I prepared, which I am not going to go through because you obviously are well prepared on the issues, but there is one slide I would like to show you.

THE COURT: Very well. Have you shown the other side?

MS. RUDZIN: No. I am handing it to them right now.

THE COURT: A little surprise, Mr. Dreyer.

MR. DREYER: We'll look at it together for the first time, your Honor.

MS. RUDZIN: So, your Honor, I will start with --

THE COURT: Was this a presentation that you were thinking of doing that --

MS. RUDZIN: I was but you clearly know all the issues so I don't need to go through it.

If you look at slide 4, this is the clause of the injunction that's at issue.

THE COURT: Wait. I'm sorry. Let me get my version.

(Pause)

All right. I mean, Fresh's point is it contains "berry" and it is intended to be refrigerated or chilled at the point of sale.

MS. RUDZIN: Right. But it only contains berry juice or concentrate.

So if you turn to slide 5, this is where we show the two possible interpretations of the sentence in the injunction.

THE COURT: You have given me this PowerPoint. Let me just look at the appreciating one. I think Exhibit B, there are things that the jury saw.

MS. RUDZIN: Right. And the point on that slide, your Honor, I think we've been through is that some of these products were presented on both claims and some were presented only on the Lanham Act claim.

THE COURT: I am going to mark this slide deck as Del Monte Exhibit A, if that is all right.

MS. RUDZIN: Certainly.

THE COURT: All right. Injunctions are supposed to be narrow. I know that.

We shouldn't enjoin people from doing things that are legal. I know that.

And now we come to the contract, go ahead. The injunction.

MS. RUDZIN: Right. 4 is the injunction. And if you

turn to 5, this is where we show you the ambiguity in the injunction and the two possible interpretations. The top one being that it enjoins us from making a product that contains one of the five fruits in any form, including juices, concentrates and purees, which were not at issue in the trial; we all agree on that.

Alternatively, the second one is that it only enjoins us from using the mark on cut pieces of the five fruits, because, as Mr. Dreyer said, that's what the trial was about, cut fruit.

We think the second interpretation is the only appropriate one, and that's why we're asking you to clarify or modify the injunction to just add the word "cut pieces of." So what I'm saying, your Honor, to answer your question about, well, how can I decide whether you have the right to do juices, concentrates and purees, I'm saying nobody is asking you to do that. I'm just asking you to only enjoin what the jury actually decided, which was uncut pieces, and leave the question of juices, concentrates and purees for another day. But it's not fair to say, well, we haven't decided that so I am not going to say anything on it, because there is an injunction that could be read to preclude us from doing products we everybody in this room agrees have a legal right to do. That's the issue.

MR. DREYER: May I respond, your Honor?

THE COURT: Yes.

MR. DREYER: First of all, the notion that, quote, all the jury decided was cut fruit was a breach, that's not what the jury decided, that's not part of the verdict form. It sounds great but that is not what was litigated. Moreover, two years before trial we put Del Monte Corp. on notice that we believed that the acai product contained nonutilized fruit and was a breaching product. They had two years to raise this issue that, no, it should not be considered a product containing nonutilized fruit because it's in some sort of liquid form. They never did.

In terms of the notion that the injunction is ambiguous, I would remind your Honor that in the briefing on what the scope of the injunction should be, we proposed language that was almost identical to the injunction you ordered, that they would not be allowed to sell products containing any of the five fruits. Del Monte Corp., with prior counsel, counsel that tried the case, objected to that language and said that language clearly would include the acai product. They didn't think it was ambiguous at the time. They said it would include the acai berry product, and we said exactly, it should. We maintained all along that that was a breaching product. We maintained all along that it contains nonutilized fruit. And the injunction you entered, other than not defining the word "five fruits" but listing them individually, tracks

almost exactly what we proposed and exactly what they said would cover the product that we're now arguing over.

THE COURT: Well, when they didn't provide the representation to you, you didn't say, all right, then we're maintaining our position that pear chunks are included, correct?

MR. DREYER: I believe what we said is if they provided some evidence that this would have to be withdrawn, they never provided the evidence. It is now two years later and, therefore, there is nothing to withdraw.

THE COURT: No. Therefore, your claim is still in the case and covered by the injunction; that is your point?

MR. DREYER: Correct, your Honor.

THE COURT: OK.

MS. RUDZIN: A couple of points, your Honor.

First of all, I wasn't counsel in the case so maybe I'm misremembering but I think I looked at the record pretty well. The injunction that Mr. Dreyer's client proposed listed 17 products that we are prohibited from making, and it included the pear chunks product. That's why we said no, you can't include the pear chunks product. We weren't saying your language is too broad, because we were reading it the way we still read it today which is it should only cover physical pieces of the five fruits. And I thought --

THE COURT: No, but that does seem to be narrower than

the way the case was litigated because it was litigated under -- I keep on returning to the License Agreement -- under B as refrigerated nonutilized fruit, not including pineapple. The universe at that time, at least in everyone's mind, I think, or let me say in the parties' minds, the universe consisted of refrigerated nonutilized fruit, one part of the universe, and the other part of the universe, making up 100 percent of the universe, was concentrates and purees under A. It didn't seem to be placed in the universe for a separate thing called juice.

MS. RUDZIN: Well, I think that's because juice was never in the universe. I'll take you back to FDP's complaint where --

THE COURT: I know. You have it in your deck here.

MS. RUDZIN: Yes. They said everybody -- we all know that we were the ones who made the juice, not FDP.

THE COURT: You want to show me 7, is that what you are showing me?

MS. RUDZIN: Yes, the cut-fruit products.

THE COURT: OK. I've got it.

MS. RUDZIN: 7. They claimed the breach of the license was the cut-fruit products. Now, if you turn to slide 8, please, this shows -- this was the issue throughout the litigation. They acknowledged in their summary judgment brief concentrates and purees, not relevant. The Pretrial Order

doesn't mention juices, concentrates or purees. No trial witness testifies about who has the right to use the mark on juices, concentrates and purees. And as Mr. Dreyer pointed out, the verdict form doesn't specify, your opinion doesn't specify. And I think that your assumption that A and B and the Wafer License add up to a hundred percent is where we disagree.

Juice, they don't get any rights to juice. So --

THE COURT: Well, no, no. It is not that you and I disagree, this Exhibit B is the universe, right? Because they were -- the predecessors by several generations, I believe, of these parties were negotiating the universe. They weren't leaving out things; they were splitting up the world.

MS. RUDZIN: Yes, your Honor, they were splitting up the world, and the world gave we had juice, they didn't.

THE COURT: I'm sorry.

MS. RUDZIN: We had juice, they didn't, when the world was split up. And the way the license is structured, we have all rights. We can use "Del Monte" on bread, on candy, on anything we want. They can only use "Del Monte" on things we explicitly said --

THE COURT: Right. That goes back. That is part of what's underlying your position here. You have the mark.

MS. RUDZIN: Right. So we get to use it on juice because we didn't give them the right to use it on juice, and they get to use it on concentrates and purees in certain

circumstances but only on a nonexclusive basis. So how can you enjoin us from making a product that contains only concentrate or puree or juice? They don't have rights to it.

Now, the elephant in the room is why was it in their expert report and we didn't object? Obviously, your Honor, I assume my predecessors made a mistake. But Del Monte already paid for that mistake because we already paid millions of dollars in damages on products that wasn't a breach, and that's my client's problem. But as far as the injunction goes, going forward we can't be enjoined from making something we've had the legal right to make and didn't give away 25 years ago when we signed this contract, which is the right to use the mark on juices, concentrates and purees.

THE COURT: All right.

MR. DREYER: Your Honor, may I respond?

THE COURT: Yes.

MR. DREYER: I find it interesting, despite our invitation to get some sworn client affidavit, that this ingredient is from concentrates and purees. Now, two years have passed. We don't have that. We have counsel making a statement in court. We have a clear record that -- and, again, this is not about beverages, this isn't a beverage product. You don't finish running a race or going to the gym and open up a can of pear chunks as a beverage. That is a different case. This is about a cut-fruit product that was among the list of

almost two dozen products that both sides agreed contained nonutilized fruit.

Is it a mistake? I don't know. I know that Ms. Stamm and her client were focusing on that list very carefully in 2010, when they took two products off of it and not this one. What I think happened, your Honor -- and I'll never be able to prove this, this is a creative lawyer's argument -- after the fact, after the case went to the jury after Del Monte Corp. lost, then all of a sudden in their post-trial briefing they come up with a gotcha: This isn't really a cut-fruit product, it's a juice product, and it should have been included.

Well, it wasn't --

THE COURT: You mean that is their argument?

MR. DREYER: I think that is what their argument is, your Honor.

THE COURT: The record sounds as if you are saying that now on behalf of Fresh. It's their argument.

MR. DREYER: Yes. I'm sorry. Yes. It is Del Monte's argument that they came up with this after the fact, after the Pretrial Order, after the trial, after the jury award, after the jury was given revenue figures that included this product, when they could have raised this argument a year before trial, two years before trial, on the eve of trial, or even at trial. It didn't occur to anybody because they considered this to be a nonutilized fruit product just like we did.

I think the record is completely clear on that, your Honor.

MS. RUDZIN: Your Honor, can I just say one thing on this?

THE COURT: I just want to look at my notes and then I will give you an opportunity.

(Pause)

All right. Basically, in a roundabout way, I think we have covered everything that I had on my list of questions.

Was there anything, Fresh, that you wanted to say, that you wanted to add? Regardless of whether I modify or clarify, on one hand, or don't, on the other, I'm not sure you are entitled to fees and costs here. I mean, the standard there is pretty high. It seems to me we have a legitimate dispute.

Make your best argument, if you wish, as to why, assuming I agree with your substantive position, I should grant fees and costs.

MR. DREYER: Well, I think it's because --

THE COURT: No bad faith here, right?

MR. DREYER: Forgive me, your Honor. I didn't mean to speak over you.

I think the basis principally is Del Monte's submission to the Court of 5/18/12, when it cites the injunction language we asked for and said it would include

juice products. And the language, of course, covered the language that we asked for. The list of products was something different entirely.

But more to the point, your Honor, at a minimum, I believe that we should be entitled to the 1.75 percent royalty for any sales after the date of trial for any of the breaching products, the products that were among what the jury found violated the contract.

THE COURT: Doesn't that also require a knowing violation?

MR. DREYER: No, I don't think it requires a knowing violation. I think it is part of the sell-off period. If you'll recall, they were given roughly until the end of 2012 to sell off their existing inventory. They represented that they did. They submitted revenue figures for what we thought were all of the products. And we were paid a 1.75 percent royalty on -- as damages for all of the products that contained pineapple or nonutilized fruit, and at a minimum we should be entitled to that here, your Honor.

And, your Honor, I just want to make one thing clear. We don't believe the injunction needs to be modified. We certainly don't believe it should address juices or beverages; that is a different trial. What we do believe and, quite frankly, we think it is clear on its face, it covers all of the products that were litigated at trial as having breached the

contract. This is really only about this one product, however, the acai berry product, that we identified as breaching, and that the only argument they made was that subparagraph B doesn't extend to preserved fruit. They never made this juice argument as a defense to the acai berry product. Having not raised it at trial, having not raised it in the Pretrial Order, having not even raised it at any point up until the jury verdict, I don't think they should be entitled to raise that argument here with respect to that product.

THE COURT: All right. Ms. Rudzin.

MS. RUDZIN: A few things, your Honor.

I think there are two different questions here. There is the question of whether you should modify or clarify the injunction. And the parties agree that the injunction doesn't extend to juices, concentrates and purees because that wasn't at issue in the trial. So that's why we're entitled to have the injunction clarified.

It's great that Fresh thinks, oh, it's fine the way it is, but we have pointed out the ambiguity, and it is not fair to us to say you can't make this universe of products that's ambiguous and undefined. We're not asking the court to say we have the right to make juice.

As I pointed out in the slide, we're asking the Court to just say we don't have the right to make refrigerated product with cut pieces of the fruit. They can sue us again if

they want to talk about juices, concentrates and purees, although, as Mr. Dreyer said, that is already before Judge Oetken. We can't have an injunction that could be read to preclude us from making products that we have the legal right to make. So this is not a case of, well, I just don't need to decide it. We're asking you to say "I haven't decided it." That's all we're asking for.

As for the pear chunks product in particular, Mr. Dreyer stood up here and said the record is clear, the jury decided this was a breaching product. But where? They don't cite to anything in the trial record suggesting that they argued to the jury that the pear chunks product was a breach of the license. They say we presented this at trial, witnesses testified about it. I don't disagree. And if you look at slide I think it is 16 in our presentation, these are all the products that were presented to the jury that the witnesses testified about that weren't part of the breach of contract claim.

Yes, the experts gave total damage figures to the jury that included the pear chunks product, but the jury wasn't told that. They don't cite any lawyer argument or witness testimony about whether the pear chunks product was a breach. So, yes, we didn't come out and say --

THE COURT: What we're talking about, really -- again, I'm mindful of the need to decide only what needs to be

decided -- what we're really talking about is pear chunks, period.

MS. RUDZIN: Well, I disagree, your Honor. Yes, we need to decide the pear chunks product. But putting that aside, we want the mountain of clarification that the injunction doesn't preclude us from making some other product that contains, I don't know, banana puree, because bananas are one of the five fruits but it is only a puree. So the injunction could be read to prohibit that. And we all agree it is not supposed to be read to prohibit that. So that's why we're asking you to clarify that you haven't decided we can't sell refrigerated product with banana puree.

As for the pear chunks product in particular, Mr. Dreyer says, well, this was a change in position. I don't know because I wasn't counsel back then. But if you turn to slide 13, this is an excerpt from a declaration we put in on the post-trial briefing. And we explained that we were stopping production -- this is paragraph 2 -- as a result of the jury's verdict, we've stopped producing refrigerated products that contain the five fruits. We did not stop making the pear chunks product.

And I don't think that this employee was lying under oath. She was giving you the same ambiguous language that's in the injunction. When she talks about stopping refrigerated product that contain the five fruits, she means the five fruits

in physical form. And she went on, in paragraphs 4 and 5, to describe what products were being discontinued and reformulated, and she doesn't mention the pear chunks product.

Now, I'll tell you one other fact, your Honor, and that's that Del Monte didn't stop making the pear chunks product but they did change the label to comply with the jury's verdict on the Lanham Act claim. So why would we violate the injunction by selling a product that we were prohibited from making but change the label to comply with the jury's verdict? The answer is we wouldn't because everybody knew that on the pear chunks product the jury verdict was about the labeling.

And so to Mr. Dreyer's point of, well, this is frivolous and you knew this would be covered and we should get our attorneys' fees, I mean, no, we didn't think that at the time.

THE COURT: OK. I understand. Thank you.

Last round. Yes, sir.

MR. DREYER: Thank you, your Honor.

We didn't enumerate specific products to the jury for anything. We didn't enumerate all of the specific pineapple products because it was understood between the parties, and never disputed, that the acai product was one of the many that contained nonutilized fruits. So to say everyone knew what was out, I guess that is everyone but us, their expert and our expert, but I guess everyone knew it was out.

In terms of what's on slide 13, I'm not really sure who this helps, because this does not say that Del Monte is continuing to sell the acai product; it's completely vague. So maybe there is a gotcha in here that we didn't carefully --

THE COURT: No. I'm sorry.

Go ahead, sir.

MR. DREYER: But we didn't know what they were selling at the time. When we got sales figures, it was not entirely clear.

THE COURT: You knew they were selling pear chunks because it was part of your presentation.

MR. DREYER: It was part of our presentation --

THE COURT: And here they say what they're discontinuing, and they're not discontinuing pear chunks. So you knew they were selling pear chunks.

MR. DREYER: We didn't know they were selling pear chunks, and at this time it was an open issue. They said don't issue the injunction they've asked for because the wording covers pear chunks. That ruling came down after this list. And the very language that we proposed that they say don't do it, Judge, it includes pear chunks if you sweep in this product -- again, after the fact and after trial -- that was the injunction you issued. So I think it was certainly understood by us that the pear chunks product would have and certainly should have been discontinued.

THE COURT: All right.

MS. RUDZIN: Your Honor, just one point.

THE COURT: The very end.

MS. RUDZIN: The very end.

If you turn to slide 11, this is a quote from Fresh's reply brief, after it saw that declaration, where they not only conceded that the injunction shouldn't cover the pear chunks product if the fruit wasn't in cut form or at least was in a puree or concentrate, but they said the declaration from DMC's director makes no mention of this product. They knew, they knew back in 2012 we had to stop making that product, and they were prepared to agree it shouldn't be covered by the injunction. It was only in 2014, after they had sued us again, that they sent us a letter and said, hey, this pear chunks product is covered by the injunction, that's what highlighted the ambiguity and that's what caused us to file the motion.

THE COURT: No. I saw that they raised the issue and then you decided to bring the motion; I saw that. I think they did it in January and you moved in March or June.

Well, why didn't you represent in a sworn statement that none of the product -- five fruits that are contained in that product are other than as a concentrate or puree?

MS. RUDZIN: I have no idea, your Honor, I wasn't their lawyer. And it might be because they thought it was reconstituted juice so they couldn't say concentrate or puree,

I don't know.

THE COURT: Well, that would have raised right then, in 2013, what is the issue ahead. All right. It is not in the record.

All right. Thank you.

MS. RUDZIN: Thank you, your Honor.

THE COURT: I appreciate it.

We'll go off the record. We're done. Thank you.

(Discussion off the record)

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